

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF OKLAHOMA
 3

4 STATE OF OKLAHOMA, ex rel,)
 5 W.A. DREW EDMONDSON, in his)
 6 capacity as ATTORNEY GENERAL)
 7 OF THE STATE OF OKLAHOMA,)
 8 et al.)
 9 Plaintiffs,)
 10 V.) No. 05-CV-329-GKF-SAJ
 11 TYSON FOODS, INC., et al.,)
 12 Defendants.)
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12 TRANSCRIPT OF PROCEEDINGS

13 JUNE 15, 2007

14 MOTIONS HEARING

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 17 BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge
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19 APPEARANCES:

20 For the Plaintiffs: Mr. Louis W. Bullock
 21 Mr. M. David Riggs
 22 Mr. Richard T. Garren
 23 Mr. Frederick C. Baker
 24 Mr. W.A. Drew Edmondson
 25 Ms. Kelly S. Burch
 Mr. Robert A. Nance
 Mr. J. Trevor Hammons
 Ms. Ingrid Moll

For the Defendants: Mr. Robert W. George
 Mr. Jay T. Jorgensen

1 (APPEARANCES CONTINUED)

2 For the Defendants: Mr. Stephen L. Jantzen
3 Mr. Michael R. Bond
4 Mr. John R. Elrod
5 Mr. A. Scott McDaniel
6 Ms. Nicole M. Longwell
7 Mr. Phillip D. Hixon
8 Ms. Theresa Noble Hill
9 Mr. Robert P. Redemann
10 Mr. Robert E. Sanders
11 Mr. Bruce Jones
12 Mr. Paul Thompson, Jr.

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14 PROCEEDINGS

15 June 15, 2007

16 THE COURT: Be seated, please.

17 THE CLERK: Call case number 05-CV-329-GKF, Attorney
18 General for State of Oklahoma vs. Tyson Foods. Continued
19 motion hearing.

20 THE COURT: What I would like to do on number 66 is
21 also wrap up the aspect that we had discussed at the earlier
22 hearing, specifically the argument that Tyson withdrew as to
23 Clean Water Act preemption. And have we discussed on both
24 sides, has everybody been given an opportunity to reply to
25 that?

MR. MCDANIEL: I would like to have an opportunity to
respond to Mr. Baker's comments of yesterday, Your Honor.

THE COURT: All right, go ahead.

MR. MCDANIEL: Thank you. Good morning Your Honor.

THE COURT: Mr. McDaniel, good morning.

1 MR. BULLOCK: I was just making a scheduling
2 accommodation, Judge.

3 THE COURT: It is a fascinating issue so maybe this is
4 just a glimpse of argument to come. Go ahead.

5 MR. BAKER: May it please the Court, Fred Baker for
6 the State. A couple of points. First of all, I've never heard
7 of preemption being based upon allegations. Preemption derives
8 from law and the law has to apply. So in order for New Mexico
9 to apply to our claims, and we don't disagree with how he
10 characterizes them, but you have to have a facility, you have
11 to have a hazardous substance and that's in dispute as well.
12 So if, in fact, the Court, as the pleadings go forward, and we
13 don't think the Court should, but if the Court were to
14 determine that we haven't properly shown a facility, if we
15 haven't properly shown a hazardous substance, because all
16 CERCLA applies to is hazardous substances and the NRD, natural
17 resource damages, that flow from the release of that hazardous
18 substance.

19 If we don't show those, CERCLA doesn't apply, how can
20 a statute preempt something that it doesn't apply to. It's
21 just simply nonsensical, Your Honor. One last other comment on
22 they're stripping New Mexico of all of its context. You can't
23 look at a holding and just ignore the fact that New Mexico was
24 100 percent a CERCLA case. If you look at it, there were two
25 types of releases in that site. There were petroleum releases

1 and there were hazardous substance releases. The petroleum
2 releases, if I recall correctly, were handled under the
3 New Mexico statutory scheme. The hazardous substances which
4 triggered the Superfund site designation and so forth were
5 handled through CERCLA. So we're dealing with a CERCLA site,
6 it was a hazardous substance. So of course CERCLA applies and
7 you can't wipe that away.

8 THE COURT: Don't you agree though that CERCLA can
9 apply absent EPA's involvement and designation as a Superfund
10 site?

11 MR. JORGENSEN: Oh, by all means. Yes, Your Honor, of
12 course.

13 THE COURT: And you'd agree that if the Court
14 ultimately determines one way or the other that CERCLA applies,
15 all of the ramifications, whatever those may be, of New Mexico
16 would then apply here as well.

17 MR. JORGENSEN: Conditioned on whatever those may be
18 because I think we all have different interpretations on what
19 those would be but, yes, I agree.

20 THE COURT: I wonder, Mr. Baker, if you know what the
21 status of New Mexico is? Is there a petition for
22 reconsideration or rehearing en banc, is there a petition for
23 cert, where is it?

24 MR. BAKER: My understanding is that it -- that case
25 has not progressed any further. There is no rehearing

1 imminent and substantial endangerment. And the ability to stop
2 that conduct -- and in their papers they say, well, we deny it,
3 we deny it anyway, that RCRA doesn't apply. And they deny that
4 specifically that they have done anything wrong regardless.

5 But we also let them know, Your Honor, that, you know,
6 we're seeking other causes of action but the way to -- and
7 under Oklahoma law specifically you can't let it run off, it
8 can't pollute or cause pollution. It can't create a nuisance.
9 This is among other things. And that's where the behavior that
10 needs to be stopped. It's very clear, stop polluting, stop
11 causing poultry waste to run off into the environment, stop
12 causing a public nuisance.

13 And I reiterate, Your Honor, that there's nothing in
14 the statute or the provisions or the administrative
15 regulations, because we're not talking about a violation
16 section, which say that on this field Tyson Poultry grower X
17 for which Tyson Poultry is legally responsible caused a
18 release. It doesn't require us to do so.

19 Further, Your Honor, you know, they were also parties
20 to the UG Spavinaw decision. They know what the conduct is. I
21 want to make very clear, I mixed terms but I used it for
22 illustrative purposes that, you know, RCRA doesn't require a
23 facility that when we are talking about CERCLA, we said this
24 isn't a facility. We're saying it's still the million acres
25 where the conduct is occurring. I want to make that

1 distinction as well so as not to confuse those terms.

2 THE COURT: Here you're talking about generators,
3 transporter, operators, owners.

4 MR. HAMMONS: That's correct, Your Honor.

5 THE COURT: But we are talking about a facility. It
6 says owners or operators of a treatment, storage or disposal
7 facility.

8 MR. HAMMONS: Right.

9 THE COURT: So the term facility is used there.

10 MR. HAMMONS: The term facility is used but in my
11 mind, you know, when I think of a CERCLA facility, it's
12 somewhat different than the ones under RCRA.

13 THE COURT: You get to reply, surreply.

14 MR. JORGENSEN: I'll be very brief. So all of the
15 cases under RCRA and all of the notice provisions of the
16 federal environmental statutes say that a minimum notice has to
17 tell you enough, enough specificity to suit the two purposes.
18 That you can fix your conduct and avoid the lawsuit or the
19 State can take action and thereby avoid a lawsuit. So that
20 is -- we've been focusing here on is there a standard? That is
21 the standard. It was not met here. Now, focusing on they
22 know. They know is not the standard. Let me just say first
23 they know is not the standard. You can't -- the burden is on
24 the State to provide the notice, not just to say they know.
25 But we don't know. I don't know today.

1 MR. BAKER: Right.

2 THE COURT: -- Oklahoma Statutes 2-6-105.

3 MR. BAKER: Right. We're not seeking to apply Count
4 8, Count 9 and half of Count 7, extraterritorially.

5 THE COURT: The half of Count 7 that you're talking
6 about that you're not seeking to apply extraterritorially is
7 Title 2, Oklahoma Statute Section 2-18.1?

8 MR. BAKER: That's correct, Your Honor.

9 THE COURT: Okay.

10 MR. BAKER: With respect to the constitutional
11 arguments which I believe Mr. George started out with, so I'll
12 take them in that order as well, is first of all the dormant
13 commerce clause argument.

14 THE COURT: I mean, you would agree we've been talking
15 about this issue in chambers as a dormant commerce clause
16 issue; correct?

17 MR. BAKER: That's how we would characterize it as
18 well.

19 THE COURT: Would you agree, Mr. George?

20 MR. GEORGE: Yes, Your Honor.

21 MR. BAKER: And so we believe that the slide number
22 two, which it simply lays out the Pike test which we believe is
23 the applicable test because these statutes or these causes of
24 action are not particular to any extraterritorial conduct.
25 They do, we believe, apply evenhandedly to effectuate